

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

DAWN K. WASSON,

Complainant,

vs.

LAIE WATER COMPANY, INC.,

Respondent.

DOCKET NO. 2008-0307

ORDER GRANTING MOTION TO DISMISS FORMAL COMPLAINT
AND DISMISSING AS MOOT MOTION TO ADMIT COUNSEL PRO HAC VICE

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DAWN K. WASSON,)	Docket No. 2008-0307
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ORDER GRANTING MOTION TO DISMISS FORMAL COMPLAINT
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By this Order, the commission: (1) grants the Motion to Dismiss Formal Complaint filed by Respondent LAIE WATER COMPANY, INC. ("Respondent") on January 20, 2009 ("Motion to Dismiss"); and (2) dismisses as moot the "Motion to Admit Counsel Pro-Hac-Vicea [sic]" filed by Anthony Lucrichio, purported counsel for Complainant DAWN K. WASSON ("Complainant"), on February 18, 2009 ("Pro Hac Vice Motion").

I.

Formal Complaint

On December 4, 2008, Complainant filed a "Protest of Proposed Water Utility Rate Increase." Although filed as a protest under Hawaii Administrative Rules ("HAR") § 6-61-58, by Order filed on December 29, 2008, the commission construed Complainant's filing as a formal complaint under HAR § 6-61-67 ("Formal Complaint"); determined that the Formal Complaint appeared to substantially comply with HAR Title 6, Chapter 61,

Subchapter 5 of the commission's Rules of Practice and Procedure; and directed Respondent to file an answer to the Formal Complaint within twenty days after the date of service of the Order, pursuant to HAR § 6-61-67(e).

In the Formal Complaint, Complainant protests an increase in her water rates by Respondent. Complainant indicates that she entered into a water service agreement with Zions Securities Corporation ("Zions"), Respondent's predecessor, on September 1, 1982 ("Water Service Agreement"). Based upon the Water Service Agreement, and Respondent's assessment of Complainant's usage, Respondent informed Complainant by letter dated September 5, 2008 that it would be "adjusting [Complainant's] monthly flat rate to \$170.00 per month effective [Complainant's] September 2008 bill."¹ Complainant alleges that Respondent misinterpreted the Water Service Agreement and that the elevated readings for her usage were actually due to leaks in Respondent's system outside of her property that Respondent has failed to repair.²

In addition, Complainant alleges that Respondent "has yet to illustrate that it retains authority to increase water rates against [Complainant] when it has not shown that its ownership of the water takes precedent over that of [Complainant]."³ In support, Complainant cites to Article XI, section 7 of the Hawaii Constitution (providing that the State

¹Formal Complaint at 2.

²See id. at 2-3.

³Id. at 4.

has an obligation to protect, control, and regulate the use of Hawaii's water resources for the benefit of its people), and Hawaii Revised Statutes ("HRS") § 7-1 (providing that the springs of water, running water, and roads shall be free to all, on lands granted in fee simple; provided that this shall not be applicable to wells and water courses which individuals have made for their own use).

II.

Motion to Dismiss

On January 20, 2009, in lieu of filing an Answer to the Formal Complaint, Respondent filed its Motion to Dismiss. As background, Respondent explains that Complainant entered into the subject Water Service Agreement with Zions on September 1, 1982, as part of a settlement of a civil action. Respondent further explains:

Under the Water Service Agreement, it was agreed that Zions would provide Complainant with potable water for reasonable domestic purposes only at agreed upon rates, which were apparently based on the then current charges by the City & County of Honolulu Board of Water Supply's [sic] ("BWS"). The initial rate under Section II.3 of the Water Service Agreement was a flat rate of \$12.00. During the mid-1980's, the BWS' rates increased dramatically, and Complainant's flat rate charge was increased to \$16.00 per month, in accordance with Section II.5(f)(iii) of the Water Service Agreement.⁴

⁴Motion to Dismiss at 3 (citations omitted).

Respondent quotes the following relevant provisions from the Water Service Agreement:

Paragraph II.5(f)(iii). If a household's consumption during any twelve (12) month period of service greatly exceeds an average of 12,000 gallons per month, ZIONS may assess a proportionately larger monthly flat rate charge based upon the household's greater average monthly consumption. The increased rate shall remain in effect for one (1) year, after which, the average monthly consumption shall be recalculated and the flat rate charge readjusted accordingly. In no event shall the flat rate charge be less than the amount calculated pursuant to paragraph 4 above.

Paragraph II.4. ZIONS' flat rate charge is calculated upon the basis of an average domestic household consumption of 12,000 gallons of water per month multiplied by the Honolulu Board of Water Supply's rate for domestic water as that rate is from time to time adjusted, plus an amount equal to the Honolulu Board of Water Supply's monthly service fee charged to its domestic customers, rounded to the nearest whole dollar amount. By way of example and not limitation, when the Honolulu Board of Water Supply's monthly rate for domestic water is 76¢ per thousand gallons, and its monthly service fee is \$2.50, ZIONS' flat rate charge is \$12,.00 [sic] per month ($12 \times .76¢ = \9.12 + \$2.50 = \$11.62; rounded to \$12.00).⁵

Respondent asserts that its flat rate arrangement with Complainant was included in Respondent's initial tariff, filed on June 30, 1997, and was thereafter included in Respondent's revised tariff sheets, which were approved by the commission in two subsequent rate cases (Docket Nos. 00-0017 and 2006-0502). Starting in 2002, Respondent states that Complainant was informed

⁵Motion to Dismiss at 3-4 (quoting Water Service Agreement, attached to Motion to Dismiss as Exhibit A).

that her flat rate would be adjusted pursuant to Section II.5(f)(iii) of the Water Service Agreement, quoted above.⁶ In addition, Respondent points out that Complainant has, through the years, made many similar and repeated complaints to the commission regarding calculation of her flat rate charges and misinterpretation of the Water Service Agreement, but the commission has upheld the flat rate charge as consistent with the Water Service Agreement and found that Respondent is not in violation of any laws, rules or regulations.⁷

Based on the foregoing factual background, Respondent argues that: the Water Service Agreement authorizes Respondent to bill Complainant a flat rate charge of \$16.00 and to adjust the rate annually in accordance with Section II.5(f)(iii) of the Water Service Agreement; the commission has upheld this flat rate/annual adjustment structure in two rate case proceedings; and Complainant has long known about, acknowledged, and paid the \$16 flat rate amount, including adjusted flat rate amounts.

In addition, Respondent argues that there is no basis for Complainant's allegation that her water usage is elevated due to leaks in Respondent's system outside of Complainant's property. As explained by the Respondent in response to

⁶Respondent attached copies of several rate change notices sent to Complainant as Exhibit B to the Motion to Dismiss.

⁷Respondent attached copies of Complainant's previous informal complaints to the commission as Exhibit C to the Motion to Dismiss; Respondent attached copies of its various response letters to the informal complaints as Exhibit E to the Motion to Dismiss. The commission notes that prior letters from the commission in response to Complainant's informal complaints represented informal opinions by commission staff on matters alleged in the informal complaints, and not formal decisions by the commission.

Complainant's most recent informal complaint to the commission (IC-2007-024), in which Complainant made similar allegations about leaks in Respondent's system:

The context of the allegation suggests that [Complainant] believes her historically high usage is related to a water leak. It is important to remember that a water meter generally serves as a demarcation point - the point where the customer's line is connected to the water company's line. In this case responsibility for maintenance and integrity of the water line **to** the water meter is [Respondent's]. Responsibility for maintenance and integrity of the water line **from** the water meter is the customers. The water meter only records the amount of water passing through it. If [Complainant] is suggesting [Respondent] has a water leak on its side of the meter - the water meter would not capture that leak and she would not be charged. However, if [Complainant] is suggesting that there is a leak on her side of the meter then the obligation to repair that leak rests with her.⁸

Finally, Respondent maintains that Complainant's allegations regarding lack of ownership of water rights fall within the purview of the Commission on Water Resources Management ("CWRM") and fail for lack of subject matter jurisdiction. Respondent cites the commission's order denying intervention to Complainant in Respondent's last rate case (Docket No. 2006-0502), in which Complainant attempted to intervene in that docket on similar grounds. There, the commission determined as follows:

[P]ursuant to the State Water Code, HRS § 174C-7(a), the CWRM is granted exclusive jurisdiction and final authority to decide such matters. As explained by the

⁸Exhibit E, attached to the Motion, at 4 (emphasis in original); see also Motion to Dismiss at 8-9.

Hawaii Supreme Court in Ko'olau Agricultural Co., Ltd. v. Commission on Water Resource Management, 83 Hawai'i 484, 927 P.2d 1367 (Haw. 1996):

The State Water Code was enacted in 1987 pursuant to constitutional mandate. 1987 Haw. Sess. L. Act 45, at 74. Article XI, section 7 of the Hawai'i Constitution (1978) provides in pertinent part that:

The State has an obligation to protect, control, and regulate the use of Hawaii's water resources for the benefit of its people.

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality, and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

The Code established the Commission on Water Resource Management and bestowed upon it "exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code, except as specifically provided in this chapter." HRS § 174C-7(a) (1993).⁹

For the same reasons, Respondent asserts that the commission should dismiss the Formal Complaint in this docket for lack of subject matter jurisdiction.

Complainant did not file an opposition to the Motion to Dismiss.

⁹Order No. 23446, filed on May 18, 2007, in Docket No. 2006-0502, at 10 (citation omitted) (emphasis in original).

Based on a review of the entire record herein, the commission agrees with Respondent and determines that the Formal Complaint should be dismissed. As the commission has found with respect to Complainant's several, similar complaints in the past, the Water Service Agreement authorizes the flat rate structure currently charged by Respondent to Complainant and Complainant has received proper notice of these charges.¹⁰ Complainant alleges that her water bills are high due to leaks in Respondent's system. However, as described by Respondent, Complainant's water meter reads and records only the water consumption occurring on Complainant's property, and not water usage from piping or facility systems not located on her property. Thus, even assuming that Complainant's allegations about leaks in Respondent's system are true, Complainant would not be billed for any such leaks. Moreover, as the commission found when it denied intervention to Complainant in Docket No. 2006-0502, the CWRM has exclusive jurisdiction over Complainant's water rights claims against Respondent. Those claims here should likewise be dismissed for lack of subject matter jurisdiction. For all of these reasons, the commission grants Respondent's Motion to Dismiss.

The commission notes that Complainant has previously raised the identical issues concerning prior bills through the commission's informal complaint process on a number of separate occasions. While Complainant is entitled to invoke the

¹⁰Complainant's flat rate arrangement has been included in Respondent's original and revised tariff sheets, which have been approved by the commission in Docket Nos. 7830, 00-0017, and 2006-0502.

commission's informal and formal complaint processes in the future, the commission cautions Complainant about the relitigation of the identical factual and legal issues addressed by this Order. More specifically, relitigation of the same factual and legal issues that have previously been raised and decided by the commission is improper.

III.

Pro Hac Vice Motion

In the Pro Hac Vice Motion, Mr. Anthony Lucrichio, purported counsel for Complainant, requests that the commission allow Mr. Harold S. Shephard to appear pro hac vice on Complainant's behalf in this docket. Given the commission's dismissal of the Formal Complaint herein, the commission dismisses the Pro Hac Vice Motion as moot.

IV.

Orders


THE COMMISSION ORDERS:

1. Respondent's Motion to Dismiss is granted; the Formal Complaint is dismissed, without prejudice.
2. Complainant's Pro Hac Vice Motion is dismissed as moot.
3. This docket is closed unless otherwise ordered by the commission.


DONE at Honolulu, Hawaii

MAY - 5 2009


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

By 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Kaiulani Kidani Shinsato
Commission Counsel

2008-0307.cp

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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